



TÉLÉCOPIE • FACSIMILE TRANSMISSION

DATE: 15 March 2019

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OBJET/SUBJECT: **COMMUNICATION FROM SPECIAL PROCEDURES**

Please find attached a communication sent by the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes.

I would be grateful if this letter could be transmitted at your earliest convenience to His Excellency Mr. Michael Richard Pompeo, Secretary of State.

Mandate of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes

REFERENCE:
AL USA 8/2019

15 March 2019

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, pursuant to Human Rights Council resolution 36/15.

In this connection, I would like to bring to the attention of your Excellency's Government information received concerning **exposure of residents of the Commonwealth of Puerto Rico to toxic chemicals resulting from the disposal of coal combustion residuals**.

According to the information received:

AES Puerto Rico, L.P. (**AES**), incorporated in 1994, a subsidiary of The AES Corporation (**AES Corp**), owns and operates a coal-fired power plant in the municipality of Guayama, Puerto Rico. In November 2002, AES inaugurated its plant, which generates and distributes electric power through a 25-year power purchase agreement with the Puerto Rico Electric Power Authority (**Electric Power Authority**). AES markets wastes from its coal combustion processes as "coal combustion products" under the brand Agremax.

Exposure of local community to coal combustion residuals

AES generates coal ash, also referred to as coal combustion residuals (CCR) as a by-product of the coal combustion process used to generate electricity. CCR refers to wastes from the combustion process, including fly ash, bottom ash, boiler slag, and flue gas desulfurization material. The plant generates approximately 200,000 to 250,000 tons of CCR per year.

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His Excellency
Mr. Michael Richard Pompeo
Secretary of State

Chemical testing commissioned by the United States (US) Environmental Protection Agency (EPA) conducted with samples of CCR from the AES plant reveal that these wastes may contain high levels of heavy metals such as mercury, cadmium, and arsenic, as well as other contaminants and toxic chemicals, which may leak into the water, soil and air. Yet, the US EPA considers CCR a non-hazardous waste (see 40 C.F.R. § 261.4(b)(4)(i)).

A study in 2004 found the presence of heavy metals including arsenic, beryllium, vanadium, and cadmium exceeding the levels of international standards that the AES CCR. In 2018, AES published results of a chemical test showing concentrations of selenium, lithium, molybdenum, chromium, arsenic, radium, boron, and sulfates in nearby wells exceeding applicable federal standards.

Local community members link their exposure to toxic CCR to increases in various diseases and disabilities. Since 2002, cancer rates have allegedly increased. Kidney, prostate, and other cancers are reported in young adults, with cancer clusters mapped in the vicinity of the AES plant and where toxic CCR is disposed. A study found that three out of four residents on one street near the AES plant have some form of cancer. Epidemiological studies conducted in nearby communities have also found that respiratory, skin and cardiovascular diseases, and miscarriages, are more prevalent among communities located near the AES plant than in comparable communities.

Exposure to toxic “Agremax” developed from coal combustion residuals

Under the power purchase agreement with the Electric Power Authority, AES guaranteed that no waste or residue of the coal combustion process would be disposed of in Puerto Rico, nor stored on the island for over 180 days. Puerto Rico does not have any dedicated facilities for the disposal of CCR, such as landfills or impoundments. AES asserted that the company would find a beneficial commercial use for CCR.

Around 2007, the Dominican Republic refused to accept CCR from the AES plant. AES started marketing the CCR as a product for construction sites in Puerto Rico under the brand Agremax: a mixture of fly ash, bottom ash and water, compacted and dehydrated. AES over the years distributed over two million tons of Agremax for use in the construction industry in Puerto Rico, including in the Guayama, Salinas, San Juan, Caguas, Ponce, and Mayaguez municipalities.

Agremax was used as a construction fill for housing development and shopping centers, as well as ballasting roads, leaving it uncovered and exposed. To date, the exact quantity or location of the Agremax disposed of or used in Puerto Rico is unknown. Some of the Agremax deposits have occurred above aquifers used for the extraction of water for human consumption, including the South Coast Aquifer: a sole source aquifer for the residents of the Salinas (population 30,000) and Santa Isabel (population 23,000) municipalities.

By 2011, the US EPA had found that the use of Agremax as construction fill potentially constituted illegal dumping of waste. The US EPA recommended that the government of the Commonwealth of Puerto Rico adopt rules for the management of CCR taking into account Puerto Rico's environmental conditions. As a result, in 2015 the Puerto Rico Quality Board prohibited the use of Agremax as a construction fill and authorized AES to dispose of CCR in landfills in Peñuelas and Humacao. Local communities organized protests against the disposal of CCR in these landfills, claiming CCR ended up in nearby creeks, leeching into water, soil, and air, and negatively affecting agriculture and the health of residents.

Improper management of coal combustion residuals including Agremax

The EPA has previously found the plant in violation of the Clean Water Act because of unlawful discharges of water contaminated with CCR into nearby communities and water bodies. Until 2015, no landfill had been commissioned for disposal of CCR. Furthermore, Puerto Rico did not have any policies in place to regulate the adequate management and disposal of CCR. Against this background, CCR from the plant from its establishment until 2015 was being accumulated, used, and deposited near the plant in landfills and other dumping grounds, without regard for the health and environment of communities. Without proper management, these contaminants pollute surface and groundwater, soils, and air.

In 2017, the Commonwealth of Puerto Rico adopted a "Ban on the Deposit and Disposal of Coal Ash or Coal Combustion Residuals in Puerto Rico Act", Law 40-2017, which prohibited the deposit and disposal of CCR in landfills in Puerto Rico. Also in 2017, local communities and environmental organizations filed a court case against landfill operators unlawfully accepting disposal of CCR in the form of Agremax. The Puerto Rico First Instance Court dismissed their claim, reasoning that Law 40-2017 preventing the deposit and disposal of CCR does not prohibit the use or disposal of Agremax. The Puerto Rico Court of Appeals confirmed.

Late in 2018, new regulations were proposed addressing the beneficial uses of coal wastes, including Agremax. The regulations again allow for the unencapsulated use of CCR, such as its use as construction fill material. Unless it exceeds 12,400 tons of material, this use is exempt from public participation and leaching testing requirements.

As at 2019, the AES plant has a large on-site accumulation of CCR, estimated to rise 120 feet, with no cover, posing a continuing risk of exposure to the nearby population and contamination of ecosystems.

Extraterritorial impacts in the Dominican Republic

In 2003, confronted with significant accumulation of CCR and no place to dispose of it, AES contracted to transport CCR from Guayama, Puerto Rico to the Dominican Republic. Approximately 27,000 tons of CCR were deposited at Arroyo Barril and the Port of Manzanillo in the Dominican Republic. Ashes from the CCR were dragged by the coastal breeze to nearby communities, agricultural land, and to the mountains of the town.

Nearby residents, particularly children and the elderly, complained of skin lesions and difficulty breathing linked with dust from abandoned CCR. Several residents were hospitalized. The dumping was reported to have contributed to or resulted in six deaths, and from 2005 to 2008, the rate of abortions and premature births rose suddenly.

In 2007, upon finding that the CCR contained heavy metals, the Government of the Dominican Republic filed a court case against AES, and AES offered a settlement of USD 6 million. The Government of the Dominican Republic agreed to the settlement upon commitment from AES not to continue dumping CCR in the Dominican Republic.

While I do not wish to prejudge the accuracy of these allegations, I am deeply concerned about the reports of alleged violation of human rights to life, to health, to access to information, to food, and to a clean and healthy environment. Additionally, I wish to express concern about the apparent inadequacy of remedies for the reported violation of the rights of people of Puerto Rico. This is underscored by the obligation under the international human rights framework for your Excellency's Government to protect against human rights abuse by business enterprises domiciled in its country. This requires taking appropriate steps in relation to business enterprises to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations, and adjudication.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide the details of any site-specific enquiries or assessments (including chemical and environmental impact assessments) conducted in relation to the impacts of exposure to CCR and Agremax on the health and environment in Puerto Rico, including the methodologies used and the

results. If no enquiries have taken place, or if they have been inconclusive, please explain why.

3. Please provide the details on measures that your Excellency's Government is taking to protect the rights to life and physical and mental health of communities in Puerto Rico as a result of the allegedly environmentally unsound disposal of hazardous substances and wastes especially CCR and Agremax. Please specify any of your Excellency's Government's plans to ensure accountability of those responsible for human rights abuse allegedly occasioned.
4. Please provide details of particular measures including policies, legislation, regulations and adjudication, your Excellency's Government has put in place to prevent exposure to the toxic chemicals potentially present in CCR and Agremax. Please explain what special protections are afforded to pregnant women and women of reproductive age.
5. Please provide information on any measures, including policies, legislation, regulations and adjudication that your Excellency's Government has put in place to prevent, investigate, punish and redress human rights abuses by businesses operating coal-fired power plants within the territory and/or jurisdiction of your Excellency's Government.
6. Please indicate the measures taken by the Government to ensure the implementation of the UN Guiding Principles on Business and Human Rights, including any guidance provided to business enterprises on how to respect human rights throughout their operations.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

I would like to inform your Excellency's Government that a copy of this letter has been shared with the Government of the Dominican Republic, and that a letter addressing similar allegations and concerns as mentioned above has also been sent to AES Puerto Rico, L.P.

I may publicly express my concerns in the near future as, in my view, the information upon which a press release would be based is sufficiently reliable to indicate a matter warranting attention. The press release would indicate that I have been in contact with your Excellency's Government to clarify the issues in question.

Please accept, Excellency, the assurances of my highest consideration.

A handwritten signature in black ink, appearing to be 'B. Tuncak', written in a cursive style.

Baskut Tuncak

Special Rapporteur on the implications for human rights of the environmentally sound
management and disposal of hazardous substances and wastes

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, I would like to draw the attention of your Excellency's Government to the applicable international human rights norms and standards, as well as authoritative guidance on their interpretation. These include:

- The Universal Declaration of Human Rights;
- The International Covenant on Economic, Social and Cultural Rights;
- The International Covenant on Civil and Political Rights;
- The Convention on the Rights of the Child;
- The UN Guiding Principles on Business and Human Rights.

I wish to draw attention to your Excellency's Government's obligations under international human rights instruments to guarantee the right of every individual to life, liberty and security and not to be arbitrarily deprived of life, recalling Article 3 of the Universal Declaration of Human Rights (UDHR) and Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR), ratified by your Excellency's Government on 8 June 1992. I would like to call the attention of your Excellency's Government to General Comment No. 36 (2018) of the Human Rights Committee which affirms that the right to life should not be interpreted narrowly, and that it concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity (para 3). Further, it recognizes that implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors.

In addition, Article 6 of the Convention on the Rights of the Child (CRC), which your Excellency's Government signed on 16 February 1995, recognizes that every child has the inherent right to life and requires States parties ensure to the maximum extent possible, the survival and development of the child. It further requires States Parties to take all effective and appropriate measures to diminish infant and child mortality. While the United States of America has not ratified the CRC, your Excellency's Government agreed to bind itself in good faith to ensure that nothing is done that would defeat the object and purpose of the international instrument, pending a decision on ratification.

I would like to draw your attention to Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), signed by your Excellency's Government on 5 October 1977, which enshrines the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. While the United States of America has not ratified the ICESCR, your Excellency's Government agreed to bind itself in good faith to ensure that nothing is done that would defeat the object and purpose of the international instrument, pending a decision on ratification. The right to health is also guaranteed as a part of the UDHR Article 25, which is read in terms of the

individual's potential, the social and environmental conditions affecting health of the individual, and in terms of health services. Also, Article 24 of the CRC recognizes the right of the child to the enjoyment of the highest attainable standard of physical and mental health and to facilities for the treatment of illness and rehabilitation of health, and further mandated that States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures to among other objectives, "ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care".

Reference is made to General Comment No. 14 of the Committee on Economic, Social and Cultural Rights (CESCR) which describes the normative content of Article 12 and the legal obligations undertaken by the States Parties to the ICESCR to respect, protect and fulfil the right to health. In paragraph 11 of General Comment No. 14, the CESCR interprets the right to health as "an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information".

I would like to refer your Excellency's Government to the fundamental principles laid down in Article 19 of the UDHR, and Article 19(2) of the ICCPR which guarantee the right to "seek, receive and impart information" as part of the right to freedom of expression. Also, Articles 13 and 24(d) of the CRC provide respectively that "the child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice" and create an obligation for States Parties to "ensure that ... parents and children, are informed, have access to education and are supported in the use of basic knowledge of ... hygiene and environmental sanitation and the prevention of accidents".

The right to information derives from the freedom of expression. However, the right to information has been recognized as a right in and of itself and one of the rights upon which free and democratic societies depend (E/CN.4/2000/63, para. 42). Access to information is a prerequisite to the protection of human rights from hazardous substances, to public participation in decision-making and for monitoring governmental and private-sector activities. Public participation in decision-making is based on the right of those who may be affected to speak and influence the decision that will impact their basic human rights.

General Comment No. 15 of the Committee on the Rights of the Child provides that States should regulate and monitor the environmental impact of business activities that may compromise children's right to health. Maintaining disaggregated information is necessary to understand specific events in the realization of the impact of particular actions on various groups including workers and children. The CESCR has in relation to various country evaluations recommended States to improve national statistics and data collection and disaggregation.

Furthermore, General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights states that a State is considered in breach of its obligations under the Convention on the Rights of the Child where it fails to respect, protect and fulfil children's rights in relation to business activities and operations that impact on children

Finally, I would like to highlight the UN Guiding Principles on Business and Human Rights, which were unanimously endorsed in 2011 by the Human Rights Council in its resolution (A/HRC/RES/17/31) following years of consultations involving Governments, civil society and the business community. The Guiding Principles have been established as the authoritative global standard for all States and business enterprises with regard to preventing and addressing adverse business-related human rights impacts. These Guiding Principles are grounded in recognition of:

- a. "States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- b. The role of business enterprises as specialized organs or society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- c. The need for rights and obligations to be matched to appropriate and effective remedies when breached."

All States have a duty under the international human rights legal framework to protect against human rights abuse by third parties. Guiding Principle 1 clarifies the State duty "to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises." This obligation requires that a State takes appropriate steps to "prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication." In addition, this requires, *inter alia*, that a State should "provide effective guidance to business enterprises on how to respect human rights throughout their operations". (Guiding Principle 3). The Guiding Principles also require States to ensure that victims have access to effective remedy in instances where adverse human rights impacts linked to business activities occur.

The Guiding Principles also clarify that business enterprises have an independent responsibility to respect human rights. Principles 11 to 24 and Principles 29 to 31 provide guidance to business enterprises on how to meet their responsibility to respect human rights and to provide for remedies when they have caused or contributed to adverse impacts. The commentary of Guiding Principle 13 notes that business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties.(...) Business enterprise's "activities" are understood to include both actions and omissions; and its "business relationships" are understood to include relationships with business partners, entities in

its value chain, and any other non-State or State entity directly linked to its business operations, products or services”.

States may be considered to have breached their international human law obligations where they fail to take appropriate steps to prevent, investigate and redress human rights violations committed by private actors. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures.

Business enterprises, in turn, are expected to carry out human rights due diligence in order to identify, prevent, mitigate and account for how they address their impacts on human rights. Where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. Similarly, where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible (commentary to Guiding Principle 19). Moreover, where business enterprises “identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes” (Guiding Principle 22).

Furthermore, business enterprises should remedy any actual adverse impact that they cause or contribute to. Remedies can take a variety of forms and may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome (commentary to Guiding Principle 25).

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.